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No. 73-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, *Petitioner*,

v.

RICHARD M. NIXON, President of the United States, ET AL., *Respondents*

BRIEF FOR RESPONDENT GORDON STRACHAN

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QUESTIONS PRESENTED

In addition to those questions presented by the Special Prosecutor in his Petition for Writ of Certiorari the following questions are presented for review by Respondent Gordon Strachan ("Strachan").

1. Whether, under the Fifth and Sixth Amendments to the United States Constitution and Rule 17(c), Federal Rules of Criminal Procedure, materials producible by the President of the United States in

response to a trial subpoena issued at the request of the Special Prosecutor, must also be made available to all other "parties and their attorneys", including the defendants, for their inspection and use in the criminal proceeding in which the subpoena is issued.

2. Whether, if the subpoenaed materials are not producible in response to a subpoena issued on behalf of the Special Prosecutor, a member of the same branch of government as the President, they are nevertheless required to be produced in response to a motion filed by or a subpoena issued on behalf of a defendant in the criminal proceeding;

3. Whether, under the Fifth and Sixth Amendments to the Constitution and Rule 16, Federal Rules of Criminal Procedure, the Executive Branch of the United States government, including both the President and the Special Prosecutor, has a unitary duty to respond to such a motion or subpoena of a defendant and to supply him with all relevant or exculpatory material in the possession or under the control of the President and the Special Prosecutor; or, in the alternative, whether the President has a duty to allow a defendant and his attorney access to White House files to enable him to identify and obtain exculpatory material therein for use in his defense.

STATEMENT OF THE CASE

In addition to the Statement contained in the Special Prosecutor's Petition for Writ, Respondent Strachan presents the following additional facts.

On May 1, 1974, in *United States* v. *Mitchell, et al.*, (D. D.C. Crim. No. 74-110), Strachan filed a Motion for Amendment of the Order for Issuance of Sub-

poena requesting the district court to provide in its order that the subpoenaed materials be made available to all parties and their attorneys and not merely to the Special Prosecutor. Also, subsequent to the filing of the President's Special Appearance and Motion to Quash the Subpoena, Strachan filed on May 10, 1974, a Motion for Order Directing the Issuance of a Subpoena to require the President to produce certain materials alleged to be relevant, material or exculpatory and asking that Strachan's requested subpoena be issued only if the district court should decide that such materials were not required to be produced by the government in response to Strachan's motion for discovery filed May 1, 1974, or if the Special Prosecutor's subpoena were abandoned.

ARGUMENT

1. Strachan Is Entitled To Access To All Items Listed in the Special Prosecutor's Subpoena and in His Own Discovery Requests Even If the President Is Immune To Subpoena by the Special Prosecutor

In the event that this Court decides that the President is subject to a judicial order directing compliance with a subpoena duces tecum in the criminal case involved herein, then Strachan should be allowed access to those materials to the extent that such materials are within the purview of Rule 17(c). The Rule provides that materials subpoenaed under subsection (c) may be produced for inspection by the "parties" and does not restrict access to the party requesting the subpoena. Thus, although the Special Prosecutor requested and the district court ordered that only the government or the court have access to the materials produced, this Court should require that the order be modified to grant Strachan access to all such materials.

Furthermore, whether or not the President is immune to a subpoena issued on behalf of the Special Prosecutor, he should not be immune to a subpoena issued on behalf of Strachan who is an individual defendant and not a part of the Executive Branch. The Court should, therefore, resolve the question whether Strachan is entitled to the issuance of a Rule 17(c) subpoena to the President and whether relevant or exculpatory documents [1] in the possession of the President are producible pursuant to a discovery motion or a defense subpoena. Whatever the Court should rule with respect to whether the President is subject to subpoena by the Special Prosecutor, the Court may soon be asked to decide the closely related question whether a defendant may require production of such materials also and, if so, whether he may do so by motion [2] or whether he must serve a subpoena duces tecum.

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[1] It is unrealistic at this stage to insist as the Special Prosecutor does that defendants justify their requests for access to their White House files or those of others in any greater detail than they have provided in their motion papers. To date, almost four months after indictment and little more than two months before trial, the defendants have been provided no discovery except for their own grand jury testimony and their own F.B.I. statements. Thus, while the Special Prosecutor with access to voluminous grand jury materials is able to annotate his subpoena requests, defendants remain, even now, at a severe handicap in attempting to do so.

[2] Although the district court in its May 20, 1974 Opinion and Order declined to rule whether discoverable or admissible evidence in the possession or control of the President is producible in response to a defense discovery motion, subsequent to this Court's granting of the Petition for the Writ herein, and during the course of pretrial oral arguments, the district court indicated that if materials that the defendants sought were not made available to the Special Prosecutor by the President, then the individual defendants would have to serve a subpoena for the desired materials on the President. Such a requirement would further burden defendants with time consuming and costly ancillary litigation.

Accordingly, since the Court has granted the Writ and expedited its consideration of the extent of the obligation of the President to produce evidence for a criminal proceeding, the Court should, we respectfully urge, in order to accomplish the compelling purpose which justified its departure from customary appellate procedure, treat the issues herein fully and require the materials to be produced and made available to the defendants for use in their defense.

2. Respondent Has a Right to the Production by the White House of Any Exculpatory Material

In *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Giles* v. *Maryland,* 386 U.S. 66 (1967), the Court ruled that due process requires the government to disclose exculpatory evidence to a defendant for use in his defense. *Brady, supra,* and its progeny leave little doubt that the government's obligation to disclose any arguably helpful evidence to a defendant applies to the entire government and not only to the prosecutive arm. See *United States* v. *Butler,* — F.2d —, (D.C. Cir., decided April 16, 1974); *United States* v. *Deutsch,* 475 F.2d 55 (5th Cir. 1973); *United States* v. *Brandt,* 439 F.2d 642 (D.C. Cir. 1971); *Levin* v. *Clark,* 408 F.2d 1209 (D.C. Cir. 1967).

In *United States* v. *Deutsch, supra,* the United States Attorney refused a discovery request to produce the personnel file of the government's key witness which was in the possession of the Post Office Department. The trial court ruled that the prosecutor cannot be compelled to disclose something that it does not have and it denied defendant's request for discovery. The Fifth Circuit reversed, stating:

> "[T]here is no suggestion in *Brady* that different 'arms' of government, particularly when so

closely connected as this one for the purpose of this case, are divisible entities." *Id.* at p. 57.

Here, the Special Prosecutor and the White House are at odds with respect to this case, but from a defendant's perspective the President and the Department of Justice are closely connected in a direct vertical line in the prosecution of federal offenses and are part of the same branch of government. While the Special Prosecutor may have sufficient independence under Department of Justice Orders No. 551-73 and 554-73 to permit him to subpoena the President, neither that independence nor the present hostile positions of the two are sufficient to preclude the application of the *Brady* requirement to both, and neither factor is sufficient to create additional legal, procedural or practical burdens for criminal defendants embroiled in this confrontation. Such internecine disputes between agencies, branches or officers of government are not unique to this case and, when they occur, they should not be permitted to make a defendant's burden more onerous or his constitutional rights less available.

Accordingly, the Court should require the government to comply with the rule of *Brady* v. *Maryland, supra,* with respect to materials in the possession or control of the President and should determine whether the legal and practical burdens of issuing and litigating over a defense subpoena therefor should be imposed on defendants.

Moreover, it is respectfully urged that the Court resolve these questions with sufficient finality to obviate the need for the return of Respondent to this Court in

each instance where the President or other governmental units deny him needed defense materials.

CONCLUSION

Respondent Gordon Strachan respectfully requests that the Court affirm the district court's order to the extent that it requires the production of the subpoenaed materials; that the Court require that the order be modified to permit inspection of the materials by all parties; that it order the production of all relevant, material or exculpatory material in the possession, custody or control of the President requested by Respondent Strachan by Motion, or, alternatively, that it determine the rights of Respondent Strachan to the issuance of a trial subpoena to the President and the obligation of the President to honor it.

Respectfully submitted,

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